

## [Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—N.D. III.: AbbVie avoids liability after backing out of corporate inversion, \(Apr. 1, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Jay Fishman, J.D.](#)

A federal court dismissed a class action suit against biopharmaceutical giant AbbVie Inc. and CEO Richard Gonzalez because the allegations about the defendants' statements and omissions in connection with a proposed corporate inversion did not meet the Private Securities Litigation Reform Act (PSLRA) standard for proving fraud. The court dismissed the complaint without prejudice, giving the plaintiffs leave to file an amended complaint (*Rubenstein v. Gonzalez*, March 29, 2016, Dow, R.)

**Fraud claim.** The plaintiffs alleged that they suffered financial loss from stock purchases made during the relevant period. On June 20, 2014, AbbVie had announced a proposed \$54 billion merger with Shire, a pharmaceutical company based in Dublin, Ireland. On October 14, however, AbbVie announced plans to back out of the merger and pay the \$1.64 billion break-up fee. The plaintiffs alleged that certain materially false and misleading statements and omissions made by the defendants during the relevant period caused the stock to artificially inflate during that period and then significantly fall after the October announcement.

The plaintiffs' complaint hinged on seven statements the defendants made during the relevant period, including a September 29 thank-you letter from Gonzalez to Shire's employees concerning his ever-increasing confidence in the merger, and heralding the next steps.

The crux of the plaintiffs' claim, however, was that between the submission of a tax filing by AbbVie and the thank-you letter, the U.S. Treasury Department issued a notice of its intent to crack down on the practice of "tax inversions," where a U.S. company in a merger with a foreign company allows the foreign company to become the parent so that the U.S. company avoids paying U.S. taxes. According to the plaintiffs, AbbVie's sole purpose for the merger was for the tax benefits, and not to benefit the shareholders, because it backed out of the merger after the Treasury notice even while Gonzalez continued to falsely declare the shareholder benefits in the thank-you letter.

**Statements and omissions.** The court, relying on similar Seventh Circuit cases that applied the PSLRA standard, found that the six of the seven alleged misstatements did not amount to material misstatements or omissions for a Section 10(b) violation. The plaintiffs had argued that the six statements emphasized the benefits to shareholders while downplaying the tax inversion. But the court held that the plaintiffs did not allege sufficient facts demonstrating a reasonable belief that the six statements were misleading by omission, to impose on the defendant a duty to disclose that it might call off the merger if the tax rules changed.

Only the seventh statement—the thank-you letter—had merit, said the court, by supporting a reasonable belief that Gonzalez's statement (in the letter) was false or misleading at the time it was made.

**Scienter.** The court proclaimed that it only had to determine scienter from the thank-you letter since that was the only statement to meet the PSLRA standard for fraud. The court then held that the plaintiffs' failed to prove the existence of scienter's "lie" or "reckless" elements in the thank-you letter.

By the time Gonzalez sent the thank-you letter, the Treasury Department had already issued the notification, the court observed. Also, while the notification had been sent out, there was still no indication at the time of the thank-you letter that AbbVie planned to back out the merger. Therefore, absent any statements in the pleadings showing that Gonzalez knew of AbbVie's intent to back out of the merger at the time he sent the thank-you letter,

the court could only conclude that his statements in the letter at the time he sent it to Shire's employees were made with the reasonable belief that the merger was still going forward.

**Loss causation.** The court determined that the *real* relevant period for this case was not between June 20 and October 14, as the plaintiff had alleged, but between September 29 and October 14. Therefore, of the five plaintiffs in the case, only the two plaintiffs who bought shares between the issuance of the thank-you letter and the backing out of the merger could claim loss causation for economic recovery.

**Control person liability.** The court lastly determined that there could be no control person liability against Gonzalez under Exchange Act Section 20(a) because the primary liability claim against the defendant under Section 10(b) was defeated.

The case is [No. 14-cv-9465](#).

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Companies: AbbVie Inc.

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